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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 268.

THE SUGAR INSTITUTE, INC., THE AMERICAN SUGAR REFINING COMPANY, MARGARET A. JAMISON, *et al.*,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF GOLDTHWAITE H. DORR, THURLOW M. GORDON, WILSON COMPTON AND RUSH C. BUTLER, AS *AMICI CURIAE*, ON BEHALF OF THE COTTON TEXTILE INSTITUTE, INC., WINDOW GLASS MANUFACTURERS' ASSOCIATION, NATIONAL LUMBER MANUFACTURERS ASSOCIATION AND CONSUMERS GOODS INDUSTRIES COMMITTEE.

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STATEMENT

The decree of the District Court in this case has been widely read. It deals with a vital problem that confronts large sections of industry.

This brief is filed by the undersigned on behalf of The Cotton Textile Institute, Inc., Window Glass Manufacturers' Association, National Lumber Manufacturers Association

and the Consumers Goods Industries Committee. The first three named organizations are national in scope and broadly representative of the manufacturers of goods in their respective industries. The Consumers Goods Industries Committee is composed of members selected in 1934 by representatives of more than a hundred nationwide industries engaged in the production of consumers goods (as distinguished from durable goods), and has concerned itself with matters conceived to be of common interest to those industries.

The General Problem

As industry sees it, the general problem here involved is substantially this: Under present day economic conditions, particularly in the highly competitive industries, there frequently develop destructive methods and conditions of competition which are not necessary to the sound functioning of the competitive system and are highly injurious to public and private interests. Such practices tend to produce the very type of evil consequences of inequality, arbitrary discrimination and oppression which we are accustomed to fear from unregulated monopoly.

Such conditions are not self-corrective. Single individuals cannot abandon them unless their competitors abandon them. Their use by a relatively small number of competitors tends almost irresistibly to compel their use by all.

The evil results are far reaching. Discriminatory and unsound practices in one stage of the competitive process produce inequality, dislocation and destructive practices in subsequent and prior stages. They lower the standards of business ethics. They tend to destroy confidence. They

have their repercussions on the relations of employers and employees—they often exert an undue pressure toward the use of lowered wages and lengthened hours as competitive measures to meet the disastrous effects of cut-throat competition in the sale of the commodities produced by such labor.

Unless these evils are to be accepted as the necessary consequences of our competitive system, it would appear to be necessary for a voluntary cooperative effort to be made among the competitors in the industry itself to correct, or at least to mitigate, these manifest evils.

While admittedly the problem of finding practical ways of dealing with such situations by voluntary action is difficult, there are cogent reasons for not throwing up our hands. In the first place the elimination of destructive practices is not only consistent with obtaining the sound objectives of the competitive system, but it is essential to its sound functioning. In the second place, leaving these evils to perpetuate themselves incites attack on the competitive system itself and furnishes the most plausible kind of argument for the Government taking over the regimentation or actual operation of competitive industry. In the third place these injurious practices tend to be destructive of small and moderate sized concerns, and to force the conduct of industry into the hands of a few large units.

We have just experienced an attempt to deal in a wholesale way with competitive practices. The N.R.A. was an attempt to formulate laws as to the conduct of competitive business to a degree that brought Government and its police power into the direct control of the detailed conduct of practically every industrial enterprise. It had this to be said for it: It recognized the need, which industry had long

felt, for affirmative action to create affirmatively sound competitive conditions and practices. But it had the fundamental defect of attempting to work out such sounder methods of competition—not by voluntary action—but by minute affirmative governmental regulation, supervision and enforcement. That structure has been swept away. It involved a regimentation which could not be exercised in the manner attempted by Congress, if at all. Now that N.R.A. is gone, industry is again remitted to its own initiative and voluntary methods of dealing with these difficult problems under principles laid down by this Court in its decisions under the anti-trust laws.

The Particular Situation Here Involved

In broad outline the situation in the sugar refining industry appears, from the findings and opinion of the trial court, to have been as follows:

For a long period of time the various concerns in the industry have been accustomed to announce their prices to the trade, just as is done in many of the other nation-wide industries. Prior to the organization of the Institute, there had been a growing practice by many companies to depart from their openly published prices and to make secret price concessions to particular concerns in varying amounts, and to use secret variations from selling terms as a vehicle for special allowances and discriminations.

As a result, the actual price structure of the industry, instead of corresponding to the ostensible prices publicly announced, was a congeries of different prices to different customers, varying with the extent of pressure which they could exert and the degree of deception to which they and the refiners were willing to resort.

Sugar is a highly standardized article, and under the ordinary operations of free and open competition, the same price will prevail for all transactions in the same market at any given time.[1]

But this normal competitive result was obstructed and defeated by the whole devious system of secret departures from the openly announced price.

In this situation the industry, through the Institute, adopted a plan of making the *openly announced* prices and terms, the *actual* prices and terms, not merely to the portion of the trade who could not secure some special favor, but to all the trade alike. This was the basic feature of the plan.

A secondary feature of the plan was this: Once the secret direct concession on price was eliminated as a vehicle of discrimination, as it would be by adherence to the basic plan, it was evident from past experience that the pressure for discrimination would tend to make the use of certain practices in the trade, such as quantity discounts and certain distributor relationships, a convenient vehicle for such discrimination. An effort was therefore made to eliminate such practices entirely, because there appeared to be no other way of preventing their use to conceal and disguise unfair discrimination between customers.

Another feature of the plan was to decrease the costs of the refiners by eliminating, so far as general consent could be secured, certain methods of doing business which were deemed to be uneconomical, such as, for example, the continued maintenance of unnecessary consignment points.

Another phase of the plan was to secure a better knowl-

[1] See footnote *infra*, p. 38.

edge of the market by gathering statistical information as to stocks, deliveries and other factors.

The Government contended that the actual prices announced by the individual sellers and the changes which took place in them were the subject of agreement and were not the result of independent action by the individual manufacturers. The trial court found no basis in the evidence for this contention.

The court below suggested, as a substitute for agreement by a refiner to charge to all alike the prices which he published to the trade until he publicly changed them, that, instead, he make a report of his actual closed transactions to the Institute. The trial court seemed to feel that this procedure would disclose any deviations made by a refiner from his announced price and, through the fact that such deviations would thus become known, would prevent his making them. The court below condemned cooperative elimination of various practices, which action was claimed by the defendants to be necessary because these practices would be used as vehicles of discrimination. The trial court also enjoined the cooperative effort to eliminate certain practices which defendants claimed were wasteful.

Importance of This Decision

This case is highly important to industry generally because it represents an attempt by a particular industry, in a situation where there were admittedly grave and persisting evils, to deal effectively with unsound, unethical, wasteful and destructive practices, and at the same time preserve the effective functioning of competition. Those efforts, openly formulated by the defendants after careful

consideration, are now swept aside by a decree of the court below. Such a result cannot but be a discouragement to efforts on the part of industry to deal constructively with such problems in a field where it is vitally important that such efforts be made.

The industries for which we are speaking as *amici curiae* are highly competitive. They desire to remain so. They do not desire to see the small and medium-sized enterprises in their ranks eliminated through collective inability to deal with cut-throat competitive conditions. They have understood that this Court in its decisions distinguishes between constructive, sound, balanced competition on the one hand and destructive, cut-throat competition on the other. They believe that efforts to prevent or mitigate the latter are efforts to promote rather than destroy the former. Such efforts are difficult enough to make. To be fruitful they must be based on practicalities and on intimitate acquaintance with the mechanisms of the particular industry and a gauging of what measures will in fact clean up destructive practices.

It is not the purpose of this brief to discuss controverted questions of fact or to refer, except by way of illustration, to the particular cooperative action taken by the sugar refining industry to deal with the various destructive competitive practices that were preventing the sound functioning of competition in that industry. Each industry necessarily has its own particular problems. What are practicable and effective ways of dealing with them will vary with different industries.

What we are concerned with is to emphasize to this Court the widespread importance of a case of this character. We want to emphasize also the injury that might be

wrought by any sweeping condemnation of the particular methods of dealing with destructive competition used here, which this Court might find not properly adapted to the particular situation in the sugar refining industry. But chiefly, we want to urge what seem to us to be the guiding principles which should be applied in the determination of such questions—which principles we believe to be those already applied by this Court in other cases—but which we feel the court below either ignored or gave insufficient weight.

SUMMARY OF ARGUMENT

Cooperative action among competitors affecting and intended to affect the conduct of their business is not *per se* unlawful.

In determining whether the anti-trust laws forbid a given course of cooperative effort among competitors, it should be recognized that efforts calculated to promote the sound functioning of the competitive system in an industry by dealing with its defective operation are not unlawful restraints on the operation of that system. They are just the contrary, both in practical and legal effect.

The preliminary question in determining the lawfulness of any given cooperative action to eliminate destructive or wasteful practices is whether the fundamental functioning of competition is destroyed, or whether such action merely affects secondary aspects of competition.

When competition is functioning effectively in its fundamentals, measures dealing with destructive or wasteful practices are not illegal merely because of the presence of a motive and effect to stabilize conditions in the industry and bring about an improvement in returns.

Affirmative action to eliminate destructive and wasteful competitive practices must often be broad in character; and where serious evils admittedly exist, the trial court should be slow to exercise its judgment against the necessity and appropriateness of measures adopted which grow out of the practical judgment of the industry based on its experience.

ARGUMENT

POINT I

Cooperative action among competitors affecting and intended to affect the conduct of their business is not *per se* unlawful.

We start in this case with cooperative action by competitors intended to affect the way each conducts its business.

There was a time in the history of the anti-trust laws when it was contended that *any* such cooperative action was a restraint on competition, therefore a restraint of trade, and therefore *per se* violative of the anti-trust laws.

This contention was finally disposed of by this Court in *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911). A varied range of such cooperative action has been held to be lawful since that time.

Chicago Board of Trade v. *United States,* 246 U. S. 231 (1918);

National Assn. of Window Glass Manufacturers, v. *United States,* 263 U. S. 403 (1923);

Maple Flooring Association v. *United States,* 268 U. S. 563 (1925);

Cement Mfrs. Protective Assn. v. *United States*, 268 U. S. 588 (1925);
Appalachian Coals Inc. v. *United States*, 288 U. S. 344 (1933).

Cooperative action by groups of competitors to eliminate certain competitive practices has been taken in numerous industries with the approval and cooperation of the Federal Trade Commission where such practices, although not positively illegal, have been found by experience to be wasteful, unsound, unfair and unnecessary to effective competition. *Official Reports of Trade Practice Conferences, Commerce Clearing House, Inc., Federal Trade Regulation Service*, Vol. II, 7th Ed., p. 4079, *et seq.*

POINT II

In determining whether the anti-trust laws forbid a given course of cooperative effort among competitors, it should be recognized that such efforts, calculated to promote the sound functioning of the competitive system in an industry by dealing with its defective operation, are not unlawful restraints on the operation of that system. They are just the contrary, both in practical and legal effect.

There are certain types of cooperative effort among competitors which can be said from decided cases to be unlawful *per se*. *United States* v. *Trenton Potteries, et al.*, 273 U. S. 392 (1927). But this is not such a case. Ordinarily, in the efforts now being made by business men in a wide range of industries to rationalize their competitive prac-

tices, as in the case at bar, there has been no specific ruling as to the lawfulness or unlawfulness *per se* of the particular type of cooperative effort employed.

Where this is the situation it is essential to look to the objectives of the Act, and also to certain characteristics of the competitive system, to determine whether a particular course of cooperative action is or is not an unreasonable restraint of trade and therefore unlawful,—all in the setting of the business facts of the particular industry. *Chicago Board of Trade* v. *United States, supra; Appalachian Coals, Inc.* v. *United States, supra.*

1. There are methods and conditions of competition which are destructive of that healthy functioning of the competitive system which the law seeks to protect. Indeed, they are often productive of the very type of injurious consequences that flow from the monopoly which the law seeks to prevent.

There is nothing sacrosanct in a particular business practice because it happens to be used as a method of competition. Nor does the fact that a particular practice is an effective weapon of competitive warfare necessarily entitle it to protection. Indeed, some of the most effective are unlawful *per se,* and the effectiveness of such methods may in fact be directly proportionate to their illegality.

In addition to those competitive practices which are illegal *per se,* there are many others which are not held sacred in the eyes of the law. This Court has used the apt phrase of "destructive practices" to describe methods of competition which, while lawful in themselves, nevertheless are unsound from a business standpoint, and no more sacred than those affirmatively illegal. *Appalachian Coals* case, *supra.*

The fact of the matter is that there are but relatively few fundamentals essential to the effective functioning of the competitive system. If conditions in an industry are such that there is a steady pressure on each concern for quality, economy and efficiency and for its prices to be governed effectively by the changing fundamental factors of cost and supply and demand, competition is effective. In this situation its effectiveness for all its real objectives is not affected by the presence or absence of a particular competitive practice.

For example, if there is a customary discount in the trade, it is of no advantage to the public that a particular buyer secure a rebate in the guise of secret departure from that customary discount or enjoy some other form of discrimination. A concern should know where it stands. Its business fate should rest, so far as possible, on the merits of its own service and its capacity to render that service on a continuous basis. It should not be at the mercy of advantage obtained either through a dubious skill in threading the intricacies of complicated methods of securing special favors, or by the sheer pressure of size or buying power.

The main channels through which competition flows should be kept open and deepened. But that does not require the maintenance of a multitude of special practices and devices. Levees that keep the Mississippi from flowing off destructively into bottom lands and forming stagnant and miasmatic bayous are not unreasonable restraints on the flow of the river.

In the administration of this Act, there has at times been a tendency to regard every competitive practice—however unimportant—as in itself sacred and necessary

for the effective functioning of the competitive system—business fact and the law to the contrary notwithstanding. This attitude has often held back vitally needed effort on the part of business to improve its competitive methods and make our competitive system work as it should.

Effects of Destructive Practices

The records of this Court and the history of our times are replete with the dislocations of the competitive system through the use of unsound competitive practices and their disastrous consequences.

In the *Appalachian Coals* case, *supra,* the findings of the court below, where the decision as here was adverse to cooperative efforts to eliminate destructive practices, showed a whole industry eaten up by competitive practices which wiped out returns to all but a few, resulted in the wasteful conduct of the business, and put a disastrous pressure on wages and living conditions. The conditions portrayed there as a result of destructive competitive methods were the very type of oppressive consequences that would have flowed from an illegal monopoly among the buyers. Such a monopoly could not, and still obtain its supply, have forced down prices to lower levels or wrought more havoc with all who were dependent upon the industry. As a matter of fact, a monopoly even though illegal and possessed of arbitrary power, would hardly have wrought the ruin that was automatically produced by the competitive system when unbalanced and in the grip of destructive and unsound practices.

In the case at bar, the record and the findings of the court below show a picture of wholesale discrimination,

fraud and deceit. We refer to this not in criticism of this industry, but merely as illustrative of the type of competitive practice, wholly unnecessary to the effective functioning of the competitive system, which is destructive of the very purpose of that system.

If the particular cases to which we have referred—the *Coal* case and this *Sugar* case—were isolated instances of the defective working of competition through the use of destructive practices of one kind or another, other industries would not be particularly interested in them. But it is a part of the history of the times that such destructive practices are not isolated. They are widely prevalent. They corrode and destroy the sound and decent business life of the country.

The long record of trade practice conferences before the Federal Trade Commission, through its mere enumeration of the varied practices which it has been sought to eliminate, affords a devastating picture of the unsound and destructive business practices which spring up under the pressure of the competitive system when it gets out of balance. *Reports of Trade Practice Conferences, supra.*

The vice of such practices is not confined to that stage of the economic process in which they are directly used. They extend in both directions from that particular stage. For example, suppose a price structure is honeycombed with special advantages to particular wholesalers. Those wholesalers are themselves sellers in the next stage of distribution and those special advantages are destructive of fair competitive conditions in that next stage, and so on to the ultimate consumer. Further, destructive conditions in the business of the producers reflect themselves back to their relations as employers of labor. Sales below cost

furnish effective arguments with which to persuade employees to accept lengthened hours or lowered wages in order that their employer may be able to keep his business and their jobs going.

2. Destructive methods and conditions of competition are not self-corrective, but tend to spread and become chronic.

Minor aberrations of the competitive system of course tend to correct themselves. But the records in the *Coal* case and in this case illustrate the fact that over broad areas of industry they are not readily self-corrective. Instead, they tend to spread and become chronic. This is due to several characteristics of the competitive system itself.

In those industries where there is severe competitive pressure, any competitive practice used by one competitor to secure a special advantage tends to become the established practice of all. If there is, or appears to be, an opportunity for special advantage in it, others cannot afford to forego that advantage even though, if all use it, it is a burden to all. Consequently, there is an actual tendency at work to reduce the general level of methods in any such business to that of the worst and most wasteful that are employed.

The extent of the pressure will vary with certain other characteristics of competition in the particular industry. One of the phenomena which almost inevitably produce destructive competitive practices was that disclosed in the *Appalachian Coals* case, where the existence of a capacity for production far beyond what consumption would absorb produced a chronic buyer's market, which was destructive of the sound functioning of competition.

The competitive process, functioning normally, is dual in its nature—active competition among sellers in disposing of their product—active competition among buyers in securing their requirements. While both sides of the competitive process are active, there is a balance which is productive of a competitive price, fair to both buyer and seller. Actual or potential scarcity on the one hand, or actual or potential surplus on the other, immediately destroys this balance. In the one case, competition among buyers becomes panic buying, while competition among sellers to dispose of their product slacks off to practically nothing, as the sellers sit back and wait for the buyers to bid for the inadequate supply. On the other hand, the reverse is the situation where there is an actual surplus or a capacity for the potential production of such surplus. Then the seller is under the immediate urge to secure as large a proportion of the inadequate demand as possible in order to keep down overhead, keep labor employed and run his enterprise; whereas the buyer sits back and waits for offers of special advantages, and is in fact deterred from buying even then by the crumbling price structure.

Both situations tend to create prices which bear no reasonable relation to the cost of production. They are not the fair competitive price of balanced competition. They tend to have all the ear-marks of an arbitrary monopoly price. As a matter of fact, the evil of monopoly is *not* that there is *no* competition. In the case of a monopoly among buyers there is a most acute competition among sellers. Conversely, in the case of a monopoly among sellers there is a most acute competition among buyers. The difficulty is that either in the case of scarcity or in the case of overcapacity, the duality of the normal competitive processes

disappears, and competition is all, or substantially all, on one side or the other.

If such conditions are due to merely temporary causes, they are rapidly self-corrective. But as the record of the coal industry before this Court showed, and as the records of the cotton textile, lumber and many other industries would show, the lack of balance in the competitive process does not cure itself readily by the bankruptcy route. Its destructive results continue for decades. It breeds devious, underhanded and duplicitous methods.

The record in the case at bar perhaps does not show with the clarity of the *Appalachian Coals* case, the reasons for the origin and persistence throughout the industry of the destructive practices disclosed by it, though the *fact* of that widespread persistence is amply shown.

The capacity of the sugar industry seems to have been in excess of that required for the needs of consumption, except in those periods where the buyers' buying habits occasioned a rush of operation which appeared to require substantially the full use of that capacity. This situation may very well have exerted a constant, though less devastating pressure than that exerted by over-capacity in the coal industry.

Another element which often tends to produce such conditions is clearly present in the case at bar—namely, the highly standardized character of the product, and the fact that the industry has never been able to secure more than a very narrow margin between cost and selling price. Where the general price is so low and where quality is so uniformly high, the pressure on each concern to use special favors to attract particular buyers is extremely great. If destructive practices are indulged in by some, the pressure for them to become general is almost irresistible.

The factual situations of the unbalancing of the competitive system, whether by over-capacity or by scarcity, may properly be reflected in the application of the law to such set of facts and the measures used to meet such a situation. For example, no industry is more normally competitive than that of the renting of real estate for occupancy. Under normal competitive conditions there is no power in the State to regulate rentals or prices in private industry.[1] Yet where, through shortage, the competition in this business becomes all on the side of the buyer so that a fair competitive price is destroyed, then under the rulings of this Court it is within the power of a State to set a ceiling on prices which have ceased to be governed by balanced competition.[2] The industry has not ceased to be competitive. There is active competition among those seeking shelter, but it has become one-sided, abnormal competition, and so properly calls for a correction of what would otherwise be its abnormal results. And to meet the evil of such destructive competition, broad measures are necessary and permissible.

So, wherever there are the indicia of one-sided competition—and destructive, discriminatory, deceptive competitive methods are customarily the indicia of such a situation—the broad measures which may properly be taken and which must necessarily be taken as correctives of such a situation are to be looked at in the light of that situation.

In such circumstances, the power of individual large buyers to secure secret and special favors, which enable

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[1] *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543 (1924); *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 537, 538 (1923).

[2] *Block* v. *Hirsh*, 256 U. S. 135 (1921); *Marcus Brown Holding Co.* v. *Feldman*, 256 U. S. 170 (1921); *Levy Leasing Co.* v. *Siegel*, 258 U. S. 242 (1922).

them in turn to wreak havoc upon their weaker competitors when they in turn become sellers, is equally patent, and destructive of fair competition.

3. In such circumstances affirmative cooperative effort is necessary if corrective results and the establishment of sound business methods are to be obtained.

Where the sound functioning of the competitive process is broken down, individual action cannot be relied upon to restore it.

Where cut-throat competition produces destructive practices, any one concern finds it almost impossible to resist falling into the general practice. It is equally difficult for individual concerns to extricate themselves. If one concern acts alone, its business tends to go to a competitor. Yet if a sound competitive basis is to be established, such destructive practices must be eliminated.

The result is that if such situations are in fact to be met, they will have to be met either by the regimentation of public authority—national or state—or else by voluntary cooperative action in an industry itself.

4. Cooperative efforts calculated to promote the sound functioning of the competitive system in an industry by dealing with its defective operation are not unlawful restraints on the operation of that system; they are just the contrary, both in practical and legal effect. They are not restraints on trade, but restraints on destructive practices.

If the foregoing analysis of certain charactertistics of the operation of the competitive system is sound, it is inescapable that cooperative action to eliminate destructive practices and improve competitive methods in an industry

—instead of being an attack on the competitive system and an unreasonable restraint of trade—is on the contrary in aid of the sound functioning of that system and promotive of trade.

The same policy of the law which forbids the substitution of monopoly for competition should encourage those efforts to weed out from competition those destructive practices which produce—not the benefits of the competitive system—but that very type of evil consequences which flow from the monopoly which we forbid. These principles this Court has recognized. *Chicago Board of Trade* case, *supra; Appalachian Coals* case, *supra.*

The difficulties of effecting the urgently needed results, however, are obvious. But one way or another the task must be undertaken if we are to get from our present competitive system its normal and beneficial functioning. The voluntary method is certainly to be preferred to that of governmental regimentation even if the latter were constitutionally permissible. The preservation of a large number of independent competitive units is to be preferred to their aggregation into a small number.

Since, under the law as laid down by this Court, it seems to be clear that cooperative effort to root out destructive practices and create sound competitive conditions is not in violation of the anti-trust acts—but is in furtherance of their objectives—business men should not be prevented from making reasonable efforts to deal with this difficult and important problem.

POINT III

Bearing in mind the foregoing principles, the preliminary question in determining the lawfulness of any given cooperative action to eliminate destructive or wasteful practices is whether the fundamental functioning of competition is destroyed, or whether such action merely affects secondary aspects of competition.

We have pointed out above that there is a distinction between cooperative action which strikes at the basic functioning of competition in an industry and such action which merely affects the use of particular competitive practices —what might be described as the secondary aspects of competition. If the nature of the action taken is not such as to eliminate the pressure on each concern for quality, economy and efficiency; and if its price continues to be governed effectively by the changing fundamental factors of cost, supply and demand—then the fundamentals of competition are not disturbed. The court can then proceed to the second question of whether or not there are any secondary considerations which render unlawful the particular measures adopted for the elimination or establishment of particular practices.

In the case at bar, while the expression of the views of the court below is not entirely clear, nevertheless its findings would seem to indicate that the activities of the defendants dealt only with the secondary aspects of competition. From those findings there do not appear to be present the indicia of the elimination of the fundamentals of competition:

(a) There was no aggregation of the conduct of the industry in the hands of a single unit or in a small group of units. There are many actively operating refiners doing widely divergent proportions of the business.

(b) There is competitive pressure on the members of this industry by competing groups and producers endeavoring to and in fact enlarging their share of the market. In general it may be said that inter-industry competition is as effective and controlling as intra-industry competition, even where the marginal overlapping between the products is a relatively narrow one. In the case at bar the overlapping of markets for beet sugar and off-shore refined sugar on the one hand, and the domestic refined sugar on the other hand, appear to be almost complete. Unless there are peculiarities about the sugar business which do not appear in the findings, such inter-industry competition—even though the proportion of its product in a particular market may be relatively small—would alone have exerted a controlling competitive influence upon price.

(c) Within the industry itself, the findings of the court have shown that active and effective competition continued between the refiners who were members of the Sugar Institute. There appears to be nothing to indicate any lessening of activity in the solicitation of business or in the maintenance of the quality of product or service to buyers. Basic prices have repeatedly changed and the court expressly found that such changes were not the result of agreements or consultation. Price appears to have felt the fundamental influence of changing factors of supply and demand and the price of raw material—otherwise how explain the fluctuations and the relatively lower returns in

the later years of the existence of the Institute than in the earlier? How else explain the fact that when one concern advanced its price, others, as the trial court states in its opinion, frequently did not follow and sometimes took a course actually resulting in a general decline.

All these are the indicia—not of the arbitrarily determined price condemned by this Court in the *Trenton Potteries* case—but of a basic price resulting from the play of competition in a market in which independent action is taken by sellers as well as by buyers, under the influence of those factors which should govern price—the changes in supply and demand, changes in cost of raw material and the play of the market.

(d) As the court below points out in its opinion, excessive returns from an industry may be indicia of the elimination of the fundamentals of competition because, if competition is not preserving a fair competitive price level —whether that price level be too high or too low—it equally fails in its objective. But there do not appear to have been any such indicia in this case. Prices were really lower than they had been before. The increase in net profits, if any, was not great, and it is debatable whether that increase was not due to the stopping of waste and the elimination of unfair discriminations, and to the operation of other economic causes having no relation to the activities of the Institute.

The court below gave no clear-cut analysis of the financial results to the industry. It seems to have ignored the inevitable effect on returns of reversal of price trends during certain years. It states that the returns were higher after the Institute than before, but it makes no analysis of the evidence to indicate whether those higher returns were

merely due to the fact that discriminations were eliminated and buyers treated alike. In fact it would be consistent with higher returns to the defendants in the post-Institute period that there should have been an actual lowering of the price to those buyers who, in the pre-Institute period, had been paying the openly published price because of lack of strength or skill to secure secret concessions, this being more than compensated for by the obtaining of a higher price in the post-Institute period from those who had theretofore been enjoying secret concessions or rebates.[1]

Further, even assuming that there had been an increase in price after the Institute, and assuming that this was indirectly contributed to by the Institute activities, still, unless the price and returns to the industry rose to a point above that to be expected from a healthy competing industry, that is of no legal significance—unless it be the law, as apparently the lower court conceived it, that any cooperative action among competitors which happens to affect prices favorably is for that reason unlawful. That conception, which we do not believe to be the law, we will discuss in the next point.

Taking, however, the returns to the industry during the post-Institute period, as indicated by the findings, there appears to be nothing in them to indicate that they were above those of a normally healthy competing industry.

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[1] In *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 240, this Court said, as to the rule there involved which eliminated an undesirable type of competition:

> "It created a public market for grain 'to arrive'. * * * It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers."

Ranging somewhat above the level of savings banks or Liberty Bond interest, these returns certainly did not rise above that level which healthy competition should allow, taking into consideration the risks and uncertainties of such a business as compared with the investment of one's funds in savings banks or Government obligations. They do not appear to be out of line with the returns which this Court has held reasonable for public service industries.[1] They are substantially below what the four Circuit Judges of the Second Circuit found to be a normal and fair competitive return after a careful examination into the business facts of another highly competitive industry. In an arbitration undertaken in 1918 by these judges as auxiliary to a Federal Trade Commission investigation of newsprint prices, they found that a fifteen per cent return, in view of competitive hazards, was not an unreasonable one. Evidence in the *Cement* case showed a twelve per cent return to be a reasonable one for a healthy competitive industry.[2]

That there was no artificial level in price in the sugar industry to shelter the weak from the normal workings of competition was graphically illustrated by the fact that during the operation of the Institute and the plans complained of, the long established plant of one of the founders of the Institute, and for part of the period its president, was forced out of business by the pressure of the competitive struggle. This fact is also illustrative of the risks of the business.

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[1] *S. W. Bell Tel. Co.* v. *Pub. Serv. Comm.*, 262 U. S. 276, 288 (1923); *Bluefield Co.* v. *Pub. Serv. Comm.*, 262 U. S. 679, 695 (1923); *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 419 (1926); *United Railways* v. *West*, 280 U. S. 234, 252 (1930); *Dayton P. & L. Co.* v. *Comm'n*, 292 U. S. 290, 311 (1934).

[2] Transcript of Record in the *Cement* case (268 U. S. 588), filed with this Court, pages 300-301.

If this Court is satisfied from its own examination of the record that the fundamentals of the competitive process have continued at work during the period of the Institute, as would appear from the findings of fact, and that what we are dealing with in this case are secondary and incidental effects, then we suggest that the whole problem before this Court is simplified.

What we then have is *not* one of those major problems that go to the very heart of this law and are of vital consequence to the protection of the public interest. We have questions which are at best on the periphery of the scope of the law.

Our point of departure then is this: First, here is an industry in which there were admittedly grave evils of discrimination and deception, with a price structure which was admittedly vicious, both from the standpoint of buyers and of sellers.

Second, we have, admittedly, as a result of the creation of the Institute, certain substantial improvements in the functioning of competition through the eradication of the previous improper discriminations and certain other abuses.

We believe it is a fair criticism of the court below that it has failed to recognize, as a proper factor in its consideration of the propriety of the measures taken, these affirmatively useful results—to buyers as well as sellers in this industry—which followed the clearing up of the miasma of fraud and deception under which business had theretofore been admittedly carried on. The trial court rivets its attention only on what it conceives to be the *adverse* effects of these measures on the functioning of such competition—it ignores the *beneficial* effects on such competition. We

believe this evidences a lack of perspective—a myopic attention to only one aspect of the competitive situation which this Court may well find affects the validity of the conclusions reached by the court below.

With these points of departure—the continued functioning of the fundamentals of competition in the industry, with grave admitted evils admittedly cured by the particular measures taken—this Court then comes to the consideration of whether the alleged adverse incidental effects of these measures on prices and on certain buyers were of a character to outweigh their demonstrable benefits to competition in this industry and to render them unlawful.

Irrespective of what conclusion this Court may come to on the propriety of these measures from its own examination of the record, we suggest that the trial court has given insufficient weight to the principles developed in this and in the preceding points and has applied certain erroneous tests of legality which we shall presently discuss.

POINT IV

When competition is functioning effectively in its fundamentals, measures dealing with destructive or wasteful practices are not illegal merely because of the presence of a motive and effect to stabilize conditions in the industry and bring about an improvement in returns.

The elimination of the discriminatory practices found by the trial court to have prevailed in the sugar industry would naturally tend to stabilize the industry and to bring about a price structure fairer to sellers and more equitable

as between buyers. A purpose to secure a stabilization of the industry and better price structure is constantly treated by the court below as giving the color of illegality to the measures actually adopted by the industry to prevent discrimination. But as this Court has recognized, these are legitimate objects of cooperative action.

1. The Decisions

In the *Appalachian* case, *supra,* this Court held that the elimination of "destructive practices" which were destroying the possibility of a fair competitive return was the legitimate object of cooperative action among a group of competitors, saying (288 U. S., at p. 374):

> "The fact that the correction of abuses *may tend to stabilize a business,* or to produce *fairer price levels,* does not mean that the abuses should go uncorrected or that coöperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."[1]

In the *Cement* and *Maple Flooring* cases, *supra,* this Court held that cooperative action among competitors in gathering and exchanging information based on the intimate details of their business, was lawful. Such action could only have for its purpose the improvement in the financial condition of the parties resulting from that cooperative action. Greater stability, the avoidance of what this Court described as economic crises due to over-production, healthier competition, and consequently the more reasonable return which could be anticipated from business so

[1] Unless otherwise indicated, all italics used in quotations in this brief are ours.

conducted, were held to be legitimate motives and results for such cooperative action.

In the *Maple Flooring* case, this Court said (268 U. S., at p. 582):

> "It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to *stabilize trade* and industry, to produce *fairer price levels* and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise."

In the *Cement* case (268 U. S., at p. 604) this Court said that reporting of information with respect to prices and production was not unlawful:

> "* * * even though it be assumed that the result of the gathering and reporting of such information *tends to bring about uniformity in price.*"

2. Profit and Competition

There is in these decisions of this Court, we believe, a recognition of the basic requirements for the sound functioning of our competitive capitalistic system. That system does not require the elimination of reasonable profit. On the contrary fair profit is an essential cog in our economic mechanism. Without it credit is sapped. Without it confidence and the means to proceed with those improvements in equipment and processes which make possible the progressive lowering of cost and prices, are unavailable. Without it there arises a competitive pressure on that element

of cost which is bound to yield first—wages and working hours of employees—which tends to create that downward spiral in employment and purchasing power from which an industry finds it difficult to escape, and which generally spells a period of depression and disaster.

The invidious significance which the court below attaches to the increased returns which it finds resulted indirectly from the particular measures dealing with discrimination adopted by the industry, harks back to the philosophy that the buyer is a special favorite of the law as against the seller, and that anything which affects his ability to get the lowest possible price is *per se* unlawful.

But of course the anti-trust laws look as much to the protection of the seller as to the buyer. Their objective is a fair competitive price level—and that level is *not* the lowest level to which destructive competitive practices, the pressure of exceptionally strong buying power in particular individuals, and the use of deception, can force down the price.

3. Stabilization

We want to urge with all the earnestness in our power that "stabilization" is not a bad word, as the court below seems to regard it. It is a good word.

"Demoralization" is the bad word—the word of invidious significance. It means a sick industry, in which capital—the savings of the people—the life blood of industry—is destroyed and labor is subjected to low wages and grievous insecurity of life.

At one time it was insisted that demoralization must be viewed as the world used to view the plague—as something that must be submitted to as Providentially ordained.

Nothing could be done about it—even to try was impious. As in the time of Horace—"*corrigere est nefas.*"

This is a time when the whole world is seeking—almost desperately—for stability. It is impossible to build a great industrial civilization on a quicksand.

All *business men* know this. It is not only the need of big business—it is even more particularly the need of small business. It is a matter of common knowledge that in great areas where the pressure of unbalanced competition produces destructive competitive practices in their various forms, the public is sometimes served by an industry, as for example, the cotton textile industry or the lumber industry, for years without any return whatever from the investment in the industry as a whole, and often with wasting capital resources. Such situations inevitably produce in those industries conditions which raise questions as to the economic justification of the system itself and a cry for Governmental regimentation and control.

Labor has an even greater stake in the stabilization of industry. If working men have a just grievance against the present industrial organization, that grievance is the instability of wages, the instability of employment, and the fear of illness and old age. But wages and employment cannot be stabilized until we stabilize the business from which wages and employment flow. Bankrupt companies or weak companies cannot maintain benefit funds to protect against illness or old age; and even Government insurance cannot compensate a man for loss of position won by long and faithful service, or having the savings of a lifetime swept away.

The *consumer* is just as vitally interested in stabilization of industry as the producer and the laborer. Every

consumer (except perhaps that infinitesimal portion of society whose income consists solely of Government bond interest) is also a producer. Whether we are owners or managers or employees, we are producers; and even if we merely deposit our savings in the bank, through the bank's use of that money we become producers. As this Court said in the *Appalachian* case (288 U. S., at p. 372):

> "The interests of *producers and consumers are interlinked.* When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."

The truth is that the *buyer* also wants a stable price. He wants to be free from a speculative market. He would be glad to have the mal-adjustments of the competitive system so dealt with as to eliminate purely speculative and meaningless fluctuations not based on any real changes in the underlying factors—those violent and unpredictable swings which result in mere transitory cheapness, but increase the cost and risk of doing business in the end. Nor is it any advantage to him to have the seller provoked into destructive price wars by ignorance, chicanery or revenge. Mere speculative fluctuation is, perhaps, to some extent unavoidable; but it certainly is not a thing to be desired, much less deliberately protected by governmental action.

So long as the parties are free—as they apparently are in the sugar industry—each to adjust his prices from time to time to those forces which reflect real change in underlying conditions, prices will so adjust themselves. The public is not harmed if those adjustments are reached—not by hourly and daily speculative fluctuation—but by less frequent changes which allow the traders to adjust themselves to them as they occur.

4. The Trial Court's Plan

It therefore appears that the attitude of the court below—in attempting to give the color of illegality to the motives of the defendants by saying that they look toward stabilization of the industry and improvement in the price structure—contravenes the fundamental principles of the competitive system, and is not in accord with the decisions of this Court.

Moreover, the inconsistency of the court below in stressing these motives as in themselves giving an unlawful color to the corrective measures taken by the industry is immediately apparent. As an alternative, the trial court itself proposes a plan—concededly lawful—involving the reporting of past prices. It assumes that this plan would in fact be effective in eliminating discrimination and deception. If that assumption is correct, it would necessarily tend to stabilize trade and work an improvement in the price structure, with presumably favorable results to the manufacturers as well as a sounder competitive situation among buyers.

If the industry could and should adopt a plan such as the court below suggests, it would be with the same motives that it would have for using the open price system—partly no doubt out of a sheer sense of disgust for the methods of discrimination and deception which had prevailed, and partly no doubt with the desire that more stable conditions and a better price structure would result from it.

Consequently, if the broad objection of motives and effect which the trial court urges to the open price plan were of legal significance, it would be equally applicable to the plan the trial court itself proposes—or to any other plan producing the same concededly desirable result.

The attack of the trial court on the measures used by the defendants to eliminate destructive and wasteful discriminatory practices cannot then, if it is to be sustained, be rested on the ground that their purpose and effect were to improve the price structure and stabilize the industry. If what the sugar industry has done is improper, such impropriety must be found, if at all, in some other aspects of the measures which the defendants adopted.

POINT V

Affirmative action to eliminate destructive and wasteful competitive practices must often be broad in character; and where serious evils admittedly exist, the trial court should be slow to exercise its judgment against the necessity and appropriateness of measures adopted which grow out of the practical judgment of the industry based on its experience.

In developing the soundness of this principle and its application to the case at bar, we will recapitulate certain of the evils to be dealt with, classify certain of the measures adopted by the defendants, and examine the sufficiency of certain of the objections of the trial court to the validity of such measures.

1. The Evils

It is admitted, and the court below so found, that destructive competitive practices existed in the sugar industry, resulting in discrimination and deception of the gravest character. Among these was the practice of giving arbitrary, secret concessions, particularly to large buyers, which gave them advantages over their less favored competitors. This practice was cloaked in an elaborate system

of deception by which, while ostensibly maintaining customers upon a basis of competitive equality, the true situation was concealed by various subterfuges which were repugnant to the moral sense of all concerned.

Thus:

(1) *the sellers* deceived the buyers—by assuring them that they were receiving the same treatment as others; when in fact others were receiving secret rebates and concessions;

(2) *the sellers* deceived competing sellers—by representing publicly that they were selling at their published price; whereas in fact they were giving concessions to secure the customers of their competitors;

(3) *the buyers* deceived the sellers—by representing or intimating that they were receiving better offers from competing sellers, in order to secure concessions;

(4) *the buyers* who received concessions were able to take away business from others not so favored—as in the *Van Camp* case and the *Ladoga Canning* case[1];

(5) where different functions were commingled, as in the case of warehouseman and broker or dealer—the buyers also committed frauds upon sellers which had the same effect as giving them rebates, though without the seller's consent; and by means of the price concessions thus improperly secured the particular buyer secured an unfair and unwarranted advantage over other buyers; or, where the broker was also a warehouseman, he was able

[1] *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245 (1929); *American Can Co.* v. *Ladoga Canning Co.*, 44 F. (2d) 763 (C. C. A. 7th, 1930), cert. den., 282 U. S. 899.

to give secret concessions to the refiner's customers without the refiner's consent, by fraudulent manipulation of storage and withdrawal accounts;

(6) there were also certain practices believed by the defendants to be wasteful and uneconomical.

This situation not only prevented the fair and sound functioning of the competitive system, but was destructive of moral standards and made success depend upon duplicity. Honesty was no longer the best policy.

Further, such practices lead in the end to price wars of retaliation and to the general demoralization of the business.

It would have been impossible for any one member of the industry to have changed this situation. It could be remedied only by collective action.

The situation was analogous to that presented in *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304 (1934), where this Court said (p. 313):

> "* * * a trader may not, by pursuing a dishonest practice, force his competitors to choose between its adoption or the loss of their trade. A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed."

So, too, in the *Cement* case, *supra,* and in *Anderson* v. *United States,* 171 U. S. 604 (1898), this Court has held that cooperative action to prevent fraud and dishonesty were legitimate objects for trade association action.

2. Classification of Certain Measures Adopted by Defendants

To meet this situation the defendants adopted measures which fall roughly under these classifications:

(a) In order to eliminate discrimination effected through *direct* secret price concessions, they took the long prevailing practice of each refiner announcing publicly to the trade his price for his various grades and services, and made his announced prices *genuine* prices by providing that each refiner should charge those prices so announced to all alike until he publicly announced new prices—the so-called open price.

(b) In order to eliminate discrimination effected through *indirect* secret price concessions, they provided for eliminating certain practices and relationships used as substitutes for discrimination by direct price concession.

(c) They took measures for the elimination of certain practices that were regarded as wasteful.

(d) They provided for the gathering and exchange among themselves of certain facts as to their business.

3. Open Price

The primary measure deemed effective and practicable by the industry to eliminate discrimination was a measure directly in accord with the sound functioning of free competition. The open announcement by each concern of its price to all and adherence to that price until openly changed is the characteristic method of operation in the ideal free competitive market. These are the characteristics of the ancient market overt. This is the honest, straightforward

way of doing business, whether it be in a retail shop or a nation-wide industry.

It is true that wide ranges of competitive business cannot be carried on under this method of free competition because many products and services are too special and too varied in their character. But where there is a standardized article such methods are practicable and can be effective. If lived up to, they effectively eliminate discrimination through direct secret price concessions.

It is common knowledge that in the case of standardized articles in nation-wide businesses, prices are commonly published to the trade; and the policy of charging the prices so published to customers is regarded as a sound principle of business conduct and lived up to. Where, as here, destructive practices of discrimination have broken down essentially sound and honest customs of the trade, cooperative action is needed to restore them.

Of course the use of such a method, by its elimination of discrimination, makes for uniformity of price. But that has long been recognized by this Court as the proper and wholesome result to be expected of free competition in such standardized articles.[1] If the court below, in repeatedly referring to the expectation of securing "uniformity of price" as an improper motive for the defendants, referred to the type of uniformity just described, such criticism is clearly without legal justification.

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[1] *Cement* and *Maple Flooring* cases, *supra; United States* v. *United States Steel Corp.*, 251 U. S. 417 (1920); *United States* v. *International Harvester Co.*, 274 U. S. 693 (1927).

This principle is also uniformly recognized by the economists: "In the same open market at any one moment there cannot be two prices for the same kind of article." (Jevons, *The Theory of Political Economy*, p. 90.) "When there is perfect competition there is (in a given market) only one resultant price for all buyers and all sellers." (Fisher, *Principles of Economics*, p. 251.)

Of course, through such a method of conducting business, there is also a resulting improvement in the price structure over that which previously existed in this industry, because of the elimination of discrimination by secret price concession. But that again, as has been shown in the preceding point, is no valid objection. As a matter of fact, while the price to those who were previously obtaining concessions may be higher than before—on the other hand, the price to those who previously were too weak or too little skilled in such devious practices to secure such discrimination may well be lower than before. There appears to be nothing in the court's findings inconsistent with this having been the fact here.

The trial court enjoined the filing or distribution of current or future price lists—and proposed as an alternative the immediate filing and distribution of data on past and closed transactions.

The right to file information as to closed transactions was clearly sustained by the decisions of this Court in *Maple Flooring Assn.* v. *U. S.*, 268 U. S. 563, 582-583, and in *Cement Mfrs. Assn.* v. *U. S.*, 268 U. S. 588, 604-606. Since those decisions, the right to collect such data in good faith has been regarded as beyond question. This method is adapted to the character of the business of many industries, and many trade associations have been collecting such information for years with full knowledge of the administrative authorities.

On the other hand it has been the custom in many industries to post prices publicly and to publish and circulate price lists which are available to all. It was the practice in the sugar industry to publicly announce prices before there was an Institute, and that practice continued there-

after. The additional distribution of this information through the Institute merely made it more promptly, accurately and readily available throughout the trade.

A current price list is just as much a fact as the reports of past sales. Such lists circulate freely throughout the trade, they are published in trade journals, and they have unquestioned value as information bearing on competitive conditions. On the open exchanges, bid and asked quotations are quite as important as quotations on actual sales, and are as freely circulated.

In the *Chicago Board of Trade* case, 246 U. S. 231, 240, it was pointed out, as one of the special justifications of the system there approved, that:

> "Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions."

If industry is to be permitted to compete with full knowledge of the facts (and not to be driven blindfold like the ox that turns the mill) it would seem a hard and arbitrary thing to say that some kinds of information may be freely obtained and that other kinds must be withheld. Such a distinction can only be based upon the deliberate idea that, through ignorance and fear, men will be precipitated into action which, with full knowledge, they would be wise enough to avoid.

This very idea—that men must be kept in ignorance and fear—seems to be the real basis of the suggestion of the court below that if each seller knows that the *ostensible* prices are also the prices being *actually* offered, he would be less likely to lower his own price through fear that otherwise competitors might be gaining a secret advantage over

him. But was it not one of the very evils of the whole situation that, with the published prices being frequently departed from for the benefit of particular favored customers, misrepresentation by buyers as to what others were doing in this line was a ready means for inducing a refiner to make a change in his own price?

The elimination of such fear and opportunity in this case did not prevent changes in the price structure responsive to the fundamental changes in the market situation. It must always be remembered that this plan—as in the case of the price-posting practice which had previously prevailed in this industry, which prevails in so many nation-wide industries, and is bound to so prevail—does not prevent anyone from changing his price without notice or consultation at any time and at his own discretion. The Record in this case shows that the members of the industry frequently did so, and it is affirmatively found that they did so without agreement or consultation.

The other objections raised by the court below to trading on the basis of open price seem to be based on the effect of the other measures taken by the defendants to prevent discrimination through other practices than direct price discrimination, for example, the recommendations against quantity discounts, return of bags, etc.

It would seem, therefore, that *even if the elimination of any such trade practices should be deemed unlawful,* nevertheless, that objection having been removed by enjoining them, the court should then have permitted the defendants to continue this primary measure for eliminating price discrimination by secret concessions from their published prices—especially as it found no agreement to fix the prices which were published and filed.

One of the reasons why the court below approved the filing of prices on past transactions was, as in the *Cement* case, to permit the sellers to defend themselves against fraudulent misrepresentations by buyers. It is true that the filing of past prices is an important aid, and particularly would permit the business man—buyer or seller, as the case may be—to know after the event that he has been deceived, if that were any satisfaction. But if that is desirable, would it not be better to let him have the information beforehand—so that he might not be deceived at all.[1]

Further, it appears that the trial court assumed that its proposed alternative method of reporting past prices "which" as it says in its opinion "*so far as the record shows,* would not have been impracticable" would in fact have been practicable and effective. In the mind of the trial court the defendants thus seem to have had the intolerable burden at the trial of forecasting the alternatives which might occur to the court when it came to make its decision. They failed, at their peril, to forecast, and to sustain the burden of offering affirmative evidence to negative, such alternative.

4. Other Measures to Eliminate Discrimination

The open price method eliminates discrimination in price in its simple and direct form; but there are indirect methods of effecting such discrimination by various forms of subterfuge. The elimination of the direct method naturally increases the pressure to use such indirect methods of discrimination.

[1] The importance of retaining customer good will makes it very difficult to undo action that has once been taken—even though the seller was misled. In the *Cement* case less than two-thirds of the fraudulent padding of contracts was eliminated after the facts were revealed by the reports (268 U. S. at p. 603). Moreover, some action might be entirely irreparable.

It is not the function of this brief to discuss the evidence as to each of the practices so used. We do wish to point out—on behalf of the industries which we represent—that analogous situations of such indirect discrimination and fraud are found in almost every industry. It would be most unfortunate if any principle of law should be laid down which would prevent an industry in such a situation from taking action effective to put its own house in order.

It would seem that once it is conceded that sellers may fairly agree among themselves not to discriminate among their customers, then any means reasonably adapted to prevent such discrimination should be permissible.

The reasonableness of such means should be judged—not with diamond scales, by standards of unattainable subtlety, nicety and precision—but by standards that business men can practicably use.

The court below, on the other hand, seems to have held that the industry could not eliminate practices of that character if there were any variations in circumstances, however slight, to which a difference in terms could theoretically be related. It is submitted that the industry knew—out of long experience—that such differentiations would not be practicable. It knew that such nicety would thwart and defeat the very purpose considered to be desirable—namely, the prevention of discriminations. It is submitted that the industry knew—and every business man knows—that the moment steps were taken to prevent direct discrimination, such alleged differences would be used as levers for special preference, and as covers for evasion.

It would be utterly impossible to deal with such evasions, because they would raise questions of interminable complexity as to:

(a) whether discrimination would be justifiable in theory under any circumstances; and

(b) the extent to which discrimination would be justified by each of the varying factors, such as quantity—particularly in view of the difficulty of measuring the unit cost of individual sales.

The old door would be opened to the making of misrepresentations by buyers as to what other refiners were doing about such practices. The old vicious circle of lying and deceit would continue, but centered on the use of such practices.

Under such circumstances, it is suggested the judgment of the industry based on its intimate experience should prevail, unless the difference in conditions between the particular customers is one of real—not attenuated—economic importance.

Instead, though compelled by the evidence to find that such practices were being effectively used as a vehicle for discrimination, the trial court was astute to find some minor factual differences in the situation of different buyers, and on the strength of these differences, to condemn the action taken.

Compare this approach with the realistic approach which is properly made to charges of discrimination against a carrier.[1] No business is more highly competitive than that

[1] In the carrier cases uniform treatment is required for all shippers, even though there are wider differences between the different shippers in the actual costs of service with respect to particular shipments than any that have been suggested in this case. For example, quantity discounts in freight rates—with the sole exception of those based on the difference between carload and less than carload lots—are regularly disallowed, although there must be a very great difference between the cost of handling a full train-

of railroads operating between competitive points. How far would a carrier get in a defence against rebating, special allowances and discrimination by showing as a basis for its action the kind of differences in situation between shippers that seemed so important to the court below in this case? In the history of the varied methods and devices resorted to by carriers and shippers under pressure of competition to escape from the broad salutary obligation to serve all alike without discrimination, we have the analogue of the difficulties that any industry has which sets itself up to apply effectively the same salutary rule to its own conduct.

We submit that the court below does not carry over into this industrial field the lesson of long experience in the carrier field that any effort to wipe out discriminatory practices must be broad in character. It cannot, if it is to be effective, get lost in a maze of minor differences in the business situation of the parties, whether wholly theoretical or to some extent actual. There probably never was a discrimination yet—from those dwelt on by this Court in the *Standard Oil* case, *supra,* to the special allowance or special facility in the latest case before the Interstate Commerce Commission—as to which some difference in business situation might not be urged with plausibility to justify it.

It should be remembered that the same devastating consequences as between customers that flow from railroad rebates also flow from industrial rebates.

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load and a single car. *Woodward-Bennett Co.* v. *S. P. etc. R. R. Co.,* 29 I. C. C. 664, 665 (1914).

In *Providence Coal Co.* v. *Providence & Worcester R. R. Co.,* 1 I. C. C. 107 (1887), the Commission refused to allow a discount based on the annual shipment of at least 30,000 tons.

In the case of *Private Wire Contracts,* 50 I. C. C. 731 (1918), the Commission said, p. 757:

> "We have frequently said that the so-called wholesale theory has no proper place in the rates of common carriers."

We do not attempt to argue whether, on the Record, the court below in fact reached a correct solution of the problem as to each of these secondary trade practices; but we do urge that in reaching its results it failed to give evidence of grasping or giving proper weight to fundamental factors of that problem.

How practicable would a provision in the Interstate Commerce Act be if—to paraphrase the decree herein—it prohibited rebates to quantity shippers only in so far as such rebates do not "reflect, effect, or result in economies to railroads (refiners), either in direct or indirect costs?"

Again—with respect to the commingling of functions—in *New Haven R. R. Co.* v. *Interstate Com. Com.*, 200 U. S. 361, 391-395 (1906), it was found—even before the Commodities Clause—that the intermingling of the functions of *common carrier* and *dealer* in the goods carried led to discrimination against other competing dealers. This is closely analogous to the commingling of the functions of *warehouseman, broker* and *dealer* in the sugar industry.[1]

The Sugar Institute, therefore, was not without reason—in precedent as well as in its own experience—in

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[1] In the *Fourche River Lumber Co.* v. *Bryant Lumber Co.*, 230 U. S. 316 (1913) this Court held that a railroad could not justify a rebate on the ground that it was given, not in its capacity as a railroad, but in its capacity as a dealer in commodities, saying (p. 323): "The law will not permit such a chameleon-like change."

In *United States* v. *Union Stock Yard*, 226 U. S. 286 (1912), it was held that a collateral contract to assist in the construction of a plant operated in fact as a cover for a rebate.

In *Louisville & Nashville R. R.* v. *Mottley*, 219 U. S. 467, 477 (1911), it was held that, to avoid discrimination, rates and fares for transportation must be paid only in money.

The extension of credit has been held to be undue discrimination in several cases. *Hocking Valley Ry. Co.* v. *United States*, 210 Fed. 735 (C. C. A. 6th, 1914—certiorari denied, 234 U. S. 757). Judge Mack himself so held in *Vandalia R. Co.* v. *United States*, 226 Fed. 713 (C. C. A. 7th, 1915—certiorari denied, 239 U. S. 642).

believing that the vicious practice of discrimination could not be abolished so long as such opportunities for evasion as the commingling of the dual functions of warehouseman and dealer continued.

At times the court below seems to go almost so far as to hold that no discrimination should be eliminated by co-operative action unless it could affirmatively be shown to be such as would have violated Section 2 of the Clayton Act. We submit that such a test is much too limited when applied to voluntary action—as distinguished from action compelled by law.

It is well known that the limitations in Section 2 of the Clayton Act on the application of the rule against discrimination—perhaps necessary where the whole field of industry is sought to be dealt with by compulsion in a single, brief law—have seriously curtailed the scope, and in a large measure destroyed the effectiveness, of that provision.

Nevertheless, *the principle* which underlies that law is a salutary and reasonable guide of conduct. If members of an industry desire *voluntarily* to apply that principle—of uniformity of treatment—in the conduct of their own business, the courts should not, by negative regulation, prevent them from doing so effectively.

5. Simplification—Relief from Burdensome and Wasteful Complexity

One has only to read the findings to realize the interminable complexity of the practices which it is there asserted must all be meticulously preserved.

Simplification of product—reduction in the infinite variety of types and sizes of articles which wasteful competition has brought into being—is universally recognized

as a proper subject for cooperative action; and simplification of practices is just as necessary and reasonable.

Cooperative action with respect to such practices will not only prevent their use as covers for fraud, discrimination and dishonesty—it will also tend toward simplification of the competitive process. The complexity of the competitive process in many industries has increased until it has become intolerable. This growing complexity consumes and wastes the energy of industry—just as friction consumes the power of a machine.

As against the dreary complexities set forth in the findings, can there be any doubt as to the desirability of simpler methods of marketing which the manufacturers have sought to use and which simplicity the decree below prohibits? Is anyone really concerned by the debate as to whether the discount for cash shall be 2%—7 days, or 2%—7 days with 3 days of grace?

However wasteful or over-complicated forms of competition may become—nevertheless, if once established, they can only be removed by cooperative action. Their continuance by a single competitor or a handful of competitors may often constitute effective dictation to the entire trade.

Take consignment points. No matter how wasteful and without business justification the multiplication of consignment points may have become—nevertheless, no one concern acting alone could discontinue it. May it not be reasonable that, in determining whether or not it is sound business practice for manufacturers to go into or withdraw from storage and warehouse business at a particular point, or generally, that there should be conference, common judgment and action?

Particular buyers favored by an uneconomic practice have no vested right to its continuance. After all, it is not the sellers who ultimately have to pay for that situation. In the long run, it is the *other* buyers who are burdened by these additional uneconomic costs being reflected in basic prices.

6. Statistics

For years the collection of statistics has been one of the recognized functions of trade associations. The courts and the highest administrative and economic authorities have repeatedly found that this function is not only lawful, but is one which should be actively fostered by public policy.[1]

While in many cases—and indeed probably generally—trade associations do publish the statistics collected by them, at least in summary form, we feel strongly that it would be unfair to compel them to do so in all cases. Such a requirement is not only unnecessary and burdensome, but would actually prevent the collection of much desirable data.

Statistics so collected are submitted on a voluntary basis, and those competitors who do not participate by turning in their own figures for the common good should —in all fairness—not be entitled to secure the benefit of the activities of others free of cost and use them for their own benefit without reciprocal disclosures. It is true that the court below did not in terms require the data to be given to competitors, but only to purchasers and distributors. There is no practicable way, however, in which this

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[1] *Cement Mfrs. Assn.* v. *U. S.*, 268 U. S. 588, 604; *Maple Flooring Assn.* v. *U. S.*, 268 U. S. 563.

data can possibly be submitted "readily and fully" to the purchasers and distributors without getting into the hands of competitors as well.

Moreover, this limitation would affect many kinds of studies or surveys of conditions in industry through economic advisers. Such surveys are usually sought to disclose weaknesses in the industry. Members would be loath to make such disclosures unless they could limit their publicity.

Moreover, there is no way of determining how, when, to whom or to what extent data cooperatively assembled must be disclosed. If it must be mailed to every customer and potential customer, such a burden would be impossible.

On its face it would even prevent the interchange of statistical data during the discussions at general meetings of associations.

Moreover, the anti-trust laws are intended to be as protective of the seller as of the buyer. In determining market conditions, the stocks, commitments to their customers and other statistical data *of the buyer* are of quite as much significance as the statistics of the seller. To require the *sellers* to pass *their* information over to the *buyers* without a mutual exchange of information would be wholly unfair.

As a matter of fact, in vast areas of industry the buyer has been by no means the underdog. On the contrary, in many industries there has been over the past twenty years, and is today, a persistent "buyer's market". In such industries one of the great practical obstacles to securing the collection and dissemination of statistical information by the producers is the apprehension that facts so collected will one way or another reach the buyers and merely dis-

close and emphasize to them the unfavorable position of the sellers. The collection of statistics in such situations is a defensive—not an offensive measure. In such industries an insistence upon disclosure of the seller's position to the buyers, certainly without a mutual disclosure from the buyers to the sellers, would make almost impossible the carrying on of such trade association activities—and in the very industries where they are really most urgently needed.

Certainly nothing disclosed in the findings of fact in this case indicates the creation of any preponderance of competitive conditions in favor of the seller.

We submit that no such general arbitrary limitation upon the collection of statistics is supportable either in principle or upon authority. Indeed, the decision of this Court in the *Cement* case, *supra,* required the recognition that there was no such limitation. In that case the statistics were not published, as the lower court emphasized in its decision.[1] The confidential character of data as to past prices and other important statistics was pointed out, and testimony to that effect quoted in the Government's brief in this Court (pp. 92, 95, 103 and 104).[2] Moreover, the decision in this Court stated that the statistics were distributed "to members" of the Association (268 U. S. at p. 600), and that the Government was objecting to the leveling effect upon prices of "knowledge disseminated among sellers" (p. 605).

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[1] *United States* v. *Cement Mfrs.' Protective Ass'n,* 294 Fed. 390, 398-399 (D. C., S. D., N. Y., 1923).

[2] In its opinion in the case at bar, the trial court seems to have been under a misapprehension on this point (R. 243-244).

CONCLUSION

In framing the Sherman Act, Congress made an important choice. It could have framed a regulatory statute which would have been specific in its terms, dealing specifically with the various courses of conduct that might affect the competitive system, and providing specifically what might or might not be done in a wide range of varying circumstances. Instead of that, with admirable judgment and great conciseness, it in effect made the common law as to restraint of trade and monopolization in private industry applicable to interstate commerce, and turned that law over to be developed by this Court like any other branch of the common law, as a living organism.[1]

Instead of a static body of law, we have a growing body of law, capable of adapting itself to the changing industrial organism to which it is to be applied. Its objective is entirely clear. It is the maintenance of an effectively functioning competitive system. As a result of experience it is now plain that, within a wide scope, cooperative action among individual competitors may not only be consistent with that objective, but actually promotive of that objective, and that the desideratum is the greatest freedom in such development consistent with the effective functioning of the competitive process. That is the practical business problem which confronts industry today; it is the practical legal problem under the anti-trust laws which confronts the courts today.

It is not too much to say that the development of methods of securing reasonable stability and the elimina-

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[1] *Nash* v. *United States*, 229 U. S. 373 (1913); *Standard Oil Co.* v. *United States*, 221 U. S. 1 (1911).

tion of destructive practices—concurrently with the continuance of the fundamentals of competition—must be effectively continued if the competitive system in its present form is to survive. We believe that this can be accomplished by the voluntary action of industry within the antitrust laws by the application of principles already enunciated by this Court. We believe that the court below missed the spirit of those decisions. We believe it lost touch with the practical application of those decisions through following analytical subtleties and niceties of economic differentiation too far. As a result, we believe it has dealt with the basic problems involved in this case in a way to paralyze the efforts of this and other industries to deal with them—efforts which it is highly important to the public interest should be made.

We have not attempted to go into, or express any views as to situations where there is a dispute between the appellants and the Government as to whether the evidence justifies a finding of fact of the trial court. The thing we do emphasize—and the thing which we feel we may properly emphasize—is the hope and the confidence that whatever decision this Court may make on these disputed questions and on the propriety of the elimination of the particular practices under the conditions of this industry, it will recognize and express:

> First, the fundamental importance of dealing with destructive, discriminatory and wasteful competitive practices;
>
> Second, that where the fundamentals of active and effective competition are preserved, there is latitude, under the law, for an industry to deal with such practices;

Third, that measures for dealing with such practices effectively necessarily have to be broad and framed in the light of the practicalities of the situation, without undue weight being given to theoretical inexactitudes; and

Fourth, that if the measures adopted are in fact effective in eliminating discrimination, and so promoting sound competition, weight should be given to that fact.

February 3, 1936.

Respectfully submitted,

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